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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MODESTO OZUNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court granted Petitioner's motion to suppress evidence found during a search of his vehicle, holding that Petitioner did not consent to the search. The government moved to reopen the suppression hearing in order to introduce expert handwriting analysis claiming that Petitioner signed a form consenting to the search. Although the government could have introduced handwriting analysis at the initial suppression hearing, the district court reopened the hearing to admit the handwriting analysis, vacated its prior decision, and found the evidence discovered in Petitioner's vehicle admissible. The Seventh Circuit affirmed. Expressly rejecting decisions from several other circuits, it held that the government was not required to justify its failure to introduce handwriting analysis at the initial suppression hearing.

The question presented is whether a litigant moving to reopen a suppression hearing in order to introduce additional evidence must justify its failure to introduce that evidence at the initial hearing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Modesto Ozuna respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (App., *infra*, 1a–22a) is reported at 561 F.3d 728. The district court's order and oral opinion granting the motion to suppress (App., *infra*, 31a–38a) and the court's order and oral opinion vacating its grant of the motion to suppress and denying suppression (App., *infra*, 39a–50a) are unreported. The district court's judgment (App., *infra*, 23a–30a) is also unreported.

JURISDICTION

The Seventh Circuit entered judgment on April 6, 2009. Justice Stevens extended the time for a writ of certiorari until September 3, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In July 2003, an agent of the Drug Enforcement Agency ("DEA") based in Texas informed DEA agents in Chicago that a confidential informant had provided information about a plan to transport cocaine from Texas to the Chicago area in a tractor-trailer registered to "Ozuna's Express." App., *infra*, 2a. On July 28, Chicago DEA agents identified a tractor-trailer bearing the name "Ozuna's Express" and stopped the vehicle. *Id.* The agents searched the trailer, found 200 kilograms of cocaine, and arrested the driver—Modesto Ozuna. *Id.* Ozuna was subsequently indicted for possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). *Id.*

A. The District Court Suppressed Evidence Found During The Search Because Ozuna Did Not Provide Consent.

Ozuna moved to suppress the cocaine found in his vehicle, arguing (among other things) that he did not consent to the search. C.A. App., Tab 21 at 14–15. On March 2, 2005, United States District Judge John F. Grady held a hearing on Ozuna's motion. At that hearing, the government produced a single witness: DEA Special Agent Robert Glynn, one of the agents involved in Ozuna's arrest.

Agent Glynn testified that he pulled Ozuna's vehicle over to the side of the road while a second DEA agent parked his car directly in front of Ozuna's vehicle. C.A. App., Tr. Vol. 1 at 17–18. Glynn claimed that he neither handcuffed Ozuna after Ozuna exited the vehicle nor drew his weapon at any time during the encounter. *Id.* at 21, 56–58. Admittedly lacking probable cause to arrest Ozuna, Glynn purportedly

informed Ozuna that "he was not under arrest, that he was free to go, and that he did not do anything wrong." *Id.* at 19, 51. Glynn testified that Ozuna nevertheless both orally consented to the search of his vehicle and signed a form consenting to the search. *Id.* at 22–23. Because a padlock protected the trailer, Glynn "allowed [Ozuna] to go up in the truck and grab the key" and unlock the padlock, even though Glynn admittedly had not searched the truck for weapons. *Id.* at 22, 25, 60–61. DEA agents then found cocaine in the trailer and placed Ozuna under arrest. *Id.* at 25, 28.

Ozuna testified in support of his motion. He stated that he had been hired to drive a tractor-trailer loaded with limes and mangoes from Texas to the Chicago area. C.A. App., Tr. Vol. 1 at 71. Ozuna explained that the DEA agents cut his vehicle off the road, pointed a shotgun at his head, told him to "'[g]et the f*** out of the truck," and handcuffed him. *Id.* at 73–76. He testified that he rejected the agents' oral request to consent to a search of his vehicle, did not sign any form consenting to such a search, and did not provide the agents with the key to the trailer's padlock. *Id.* at 77–78, 82. Instead, Ozuna heard a "bang" coming from the trailer, saw its doors swing open, and later saw that the padlock had been broken. *Id.* at 83–84.

After hearing the testimony of Glynn and Ozuna, the district court granted Ozuna's motion to suppress. App., *infra*, 38a. The court observed in an oral ruling that the search was conducted "without a search warrant," and that "nobody says there was any probable cause to search the truck." *Id.* at 31a, 37a. Therefore, "[t]he search was either consented to or it was invalid." *Id.* at 37a.

In finding that Ozuna did not consent to the search, the court recognized that the DEA agents may well have "perceived Ozuna to be a threat." App., *infra*, 35a. It explained that "[t]his is not a traffic stop of an ordinary citizen who's exceeding the speed limit. This is a stop of a potentially dangerous and potentially murderous criminal." *Id.* at 36a. The court therefore expressed doubt about Agent Glynn's testimony that the DEA agents did not draw their weapons and allowed Ozuna to retrieve the key to the trailer padlock without having "the slightest idea what's inside the cab of that truck, whether there's a shotgun in there or a handgun or any other kind of weapon that the driver of the truck could turn on them and kill or injure them." *Id.* at 35a. "The idea that the agents would let [Ozuna] get up into the cab without their being there and before they searched the cab for the purpose of getting a key, doesn't make any more sense to me than the proposition that they would not have prepared to meet violence with violence at the time they made the stop of this person who was suspected of being the repeated hauler of enormous quantities of illegal drugs." *Id.* at 36a.

Turning to the consent-to-search form purportedly signed by Ozuna, the court compared the signature on that form to several documents containing Ozuna's known signature. While acknowledging that "we sign our name a different way every time," the court found that the signature on the consent-to-search form "looks different to me than the signatures on the other * * * documents." App., *infra*, 35a, 36a. The court concluded that the differences between the signature on the consent-to-search form and Ozuna's known signature were "too great" to find that Ozuna had signed the form. *Id.* at 36a. Accordingly, while expressing disbelief with certain as-

pects of Ozuna's testimony, the court held that the government had failed to prove by a preponderance of the evidence that Ozuna voluntarily consented to the search and therefore excluded the cocaine found in the trailer. *Id.* at 37a.

B. The District Court Reopened The Suppression Hearing, Vacated Its Original Order, And Denied The Motion To Suppress.

On March 14, 2005, the government moved to reconsider the district court's suppression order or, alternatively, to reopen the suppression hearing in order to introduce expert handwriting analysis about the signature on the consent-to-search form. C.A. App., Tab 27. In its motion, the government made no effort to justify its failure to introduce the handwriting analysis at the initial suppression hearing. Instead, the government argued that evidence that is not "'newly discovered'" may be admitted at a successive hearing, and that the handwriting analysis "had a direct bearing on the credibility of both witnesses who testified at the suppression hearing." *Id.* at 17.

The district court denied the government's motion to reconsider. C.A. App., Tab 33. However, without issuing an order resolving the government's motion to reopen, the court set a hearing to admit additional testimony regarding the motion to suppress and authorized Ozuna to hire a handwriting expert. C.A. App., Tabs 34, 37. The reopening of the suppression hearing spawned significant satellite litigation: the parties' experts authored reports opining about the authenticity of the signature on the consent-to-search form followed by three separate hearings to introduce the experts' testimony and provide oral argument about that testimony.

At a hearing held on June 14, 2005, Ozuna introduced testimony by his court-appointed handwriting expert, Ellen Schuetzner. Schuetzner testified that although there were "indications" that Ozuna may have signed the form—which she described as a "very weak opinion of authorship"—there were several inconsistencies that could indicate forgery. C.A. App., Tr. Vol. 2 at 42, 61, 70. For example, unlike the twenty-two known Ozuna signatures that Schuetzner reviewed, the signature on the consent-to-search form misspelled Ozuna's first name. *Id.* at 35. Schuetzner also observed that three different pens were used on the form (*id.* at 19–20), consistent with Ozuna's claim of forgery. Finally, Schuetzner testified that the government's use of a solvent to test the consent-to-search form for fingerprints—a test that did not detect Ozuna's fingerprints—damaged the form for purposes of conducting handwriting analysis and prevented her from determining whether the signature was forged. *Id.* at 18, 25. The court observed that the government's degradation of the consent-to-search form "strikes me as coming pretty close to spoliation." *Id.* at 28.

At a subsequent hearing held on June 23, 2005, the government introduced testimony from its handwriting expert, James Regent. Regent testified that he had the "highest degree of confidence" that Ozuna signed the consent-to-search form. C.A. App., Tr. Vol. 3 at 32. In doing so, however, Regent admitted that the signature on the consent-to-search form differed from Ozuna's known signature in numerous respects. *Id.* at 66.

On June 24, 2005, the district court held yet another hearing during which the parties provided argument and the court issued an oral ruling vacat-

ing its prior order and denying Ozuna's motion to suppress. The court explained that it did "not give any weight * * * to the government's expert when he said he believes this is the defendant's signature" on the consent-to-search form. App., *infra*, 40a. Instead, the court found the handwriting analysts' testimony helpful "in coming to [its] own conclusion," after comparing the consent-to-search form with Ozuna's known signature, that Ozuna had in fact signed the form. *Id.* The court thus rejected Ozuna's assertion that his signature had been forged, reasoning in part that "it does not make sense to me that someone who was going to * * * attempt a forgery * * * would leave off * * * the O from Modesto" and "put two Ss in Modesto." *Id.* at 45a, 46a. Finally, the court held that the DEA agents' stop of Ozuna's vehicle did not ripen into an arrest before Ozuna provided consent, concluding that "this is a close case," but finding "by the bare preponderance of the evidence that this was not an arrest but rather a *Terry* stop followed by a voluntary consent to search." *Id.* at 48a.[1]

Ozuna's first trial was held in August 2006. The district court declared a mistrial because the jury was unable to reach a unanimous verdict. App., *infra*, 6a–7a. After a second trial held in November 2006, a jury found Ozuna guilty. *Id.* at 7a–8a. The

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[1] Ozuna subsequently moved for reconsideration of the district court's denial of his motion to suppress or, alternatively, to reopen the suppression hearing in order to introduce evidence indicating that—contrary to Agent Glynn's testimony—the padlock on the trailer door was broken during the search. C.A. App., Tab 56. The district court denied the motion to reconsider but held two hearings to admit additional evidence before ultimately adhering to its denial of the motion to suppress. C.A. App., Tr. Vols. 5–6, C.A. App., Tab 67.

district court sentenced Ozuna to twenty-five years imprisonment. *Id.* at 25a.

C. The Seventh Circuit Expressly Acknowledged A Deep Circuit Split In Affirming Ozuna's Conviction.

The Seventh Circuit, per Judge Kanne, affirmed Ozuna's conviction. In doing so, the court rejected Ozuna's argument that "the district court erred in reopening the suppression hearing and allowing the government to present new evidence"—Regent's handwriting analysis—"that was available to it at the time of the original hearing." App., *infra*, 9a. The court "decline[d] to impose" a requirement that the party moving to reopen a suppression hearing in order to introduce additional evidence "justify" its failure to introduce that evidence at the initial hearing. *Id.* at 10a.

The Seventh Circuit expressly acknowledged, however, that "[s]everal of our sister circuits have * * * adopted rules requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." App., *infra*, 11a. The Seventh Circuit rejected the "bright-line rule" followed by these courts, instead adopting a "'totality of the circumstances'" approach that "leav[es] the matter to the district court's discretion." *Id.* at 12a. The court explained that its "flexible approach" better "protects society's interest" in admitting "all relevant, constitutionally obtained evidence," while allowing district judges "to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Id.*

The Seventh Circuit went on to hold that the district court did not abuse its discretion by reopening the suppression hearing. It reasoned that the handwriting analysis helped the district court to determine "whose version of the search to believe, resulting in a more accurate ruling"; that there was "no evidence that the government was engaged in a deliberate strategy to proceed in a piecemeal fashion"; and that "Ozuna has not convinced us that he was harmed in any way by the fact that the handwriting testimony was presented at the second, rather than the first suppression hearing." App., *infra*, 13a–14a. The court also rejected Ozuna's remaining arguments and therefore affirmed.

Ozuna filed a motion asking the Seventh Circuit to appoint counsel to file a petition for certiorari on his behalf. The Seventh Circuit granted Ozuna's motion and, acting pursuant to the Criminal Justice Act, appointed the undersigned counsel to file a petition for certiorari.

REASONS FOR GRANTING THE PETITION

There are three principal reasons why the Court should grant this petition. First, the courts of appeals are deeply divided with respect to whether a litigant moving to reopen a suppression hearing must justify its failure to produce the evidence forming the basis for the motion at the initial hearing. Five circuits have held that the moving party must provide justification, while three—including the Seventh Circuit in this case—have held that justification is unnecessary. The Court should resolve this longstanding circuit split to provide guidance to the lower courts and create uniformity in the law.

Second, this case presents an ideal vehicle to resolve a recurring question that is of substantial importance. Like the government here, disappointed litigants routinely move to reopen suppression hearings in order to introduce additional evidence. The resulting successive suppression hearings to hear evidence that could have been introduced at the initial hearing impair important societal interests in prompt criminal proceedings and in the conservation of scarce judicial resources. Moreover, the Seventh Circuit did not state an alternative holding or identify any other factor that might prevent the Court from resolving the question presented.

Third, the Seventh Circuit's decision is incorrect. The bright-line rule adopted by the majority of circuits requiring justification to reopen suppression hearings promotes predictability, finality, and the prompt adjudication of motions to suppress by placing litigants on notice that they must introduce all relevant, available evidence at the initial hearing. By contrast, the Seventh Circuit's malleable "totality of the circumstances" approach delays resolution of pretrial proceedings; needlessly expends judicial resources to hold successive hearings; encourages the piecemeal introduction of evidence; and threatens to overwhelm defendants with the government's superior resources. Finally, the Seventh Circuit's decision is inconsistent with this Court's conclusion under analogous facts that litigants must provide justification in order to introduce untimely evidence.

I. THE SEVENTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH DECISIONS FROM FIVE OTHER COURTS OF APPEALS.

In holding that district courts may reopen suppression hearings in order to admit additional evidence without requiring the moving party to justify its failure to produce that evidence at the initial hearing, the Seventh Circuit observed that the Second and Ninth Circuits have reached the same conclusion. App., *infra*, 10a (citing *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 196–97 (2d Cir. 2008) ("we now hold that, on a motion to reopen a suppression hearing, there is no bright-line rule that necessarily and invariably requires the government to provide a reasonable justification for its failure to offer relevant evidence at an earlier suppression proceeding"); *United States* v. *Rabb*, 752 F.2d 1320, 1322–23 (9th Cir. 1984) ("the district court may reconsider its suppression order" without requiring movant to provide "justification" for its failure to make new argument to admit evidence at initial hearing), abrogated on other grounds by *Bourjaily* v. *United States*, 483 U.S. 171 (1987)).

The Seventh Circuit expressly acknowledged, however, that "[s]everal of our sister circuits" have reached the contrary conclusion, "requiring the government to justify reconsidering, reopening, or supplementing suppression hearings." App., *infra*, 11a. Other circuits have likewise recognized that courts of appeals have taken "two approaches" to resolving motions for reopening based on evidence that was available at the time of the initial suppression hearing. *United States* v. *Bayless*, 201 F.3d 116, 131 (2d Cir. 2000); see *Rabb*, 752 F.2d at 1323 ("[w]e reject

[the D.C. Circuit's] 'justification' requirement"); see also *United States* v. *Flores-Ortega*, 2006 WL 3041372, at *2 (D. Utah Oct. 24, 2006) ("There is a split of authority on whether, when it moves for reconsideration * * * , the government must 'proffer a justification for its failure to present the relevant evidence at the original suppression hearing'"); *United States* v. *Watson*, 391 F. Supp. 2d 89, 91–92 (D.D.C. 2005) ("The courts of appeals have articulated various approaches to assessing a motion to reopen a suppression hearing").

Indeed, five courts of appeals have held, contrary to the Second, Seventh, and Ninth Circuits, that a party moving to reconsider a suppression order or to reopen a suppression hearing must justify its failure to produce the evidence forming the basis for the motion at the original hearing:

• In *United States* v. *Kithcart*, 218 F.3d 213 (3d Cir. 2000), the district court reopened a suppression hearing to allow the government to introduce testimony that the car in which the defendant was a passenger had run a red light, providing police with reasonable suspicion to conduct a *Terry* search. The Third Circuit reversed, holding that the district court erred in reopening the suppression hearing because "no explanation was even offered by the government" for its failure to introduce testimony that the car had run a red light at the initial hearing. *Id.* at 220. The court stated that "to properly exercise its discretion, the district court *must* evaluate [the government's] explanation and determine if it is both reasonable, and adequate to explain why the government initially failed to introduce evidence that may have been essential to meeting its burden of proof." *Id.* (empha-

sis added); accord *United States* v. *Coward*, 296 F.3d 176, 181–82 (3d Cir. 2002).

• In *United States* v. *Dickerson*, 166 F.3d 667 (4th Cir. 1999), rev'd on other grounds, 530 U.S. 428 (2000), the district court suppressed the defendant's confession, rejecting an FBI agent's testimony that the defendant waived his *Miranda* rights before confessing. The district court denied the government's motion to reconsider based on testimony from two other FBI agents who "corroborated" the first agent's "testimony concerning when [defendant] was read his *Miranda* warnings" because this evidence "was available at the time of the suppression hearing." *Id.* at 678. The Fourth Circuit affirmed in relevant part, explaining that "when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, * * * the movant *must* provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress." *Id.* at 679 (emphasis added). The court concluded that the government's proffered justifications for failing to introduce the additional agents' testimony at the initial hearing—that "it never believed that the district court would find [defendant] more believable" than the first agent and "did not want to burden the district court with cumulative evidence"—were insufficient. *Id.* at 678–80.

• In *United States* v. *Carter*, 374 F.3d 399 (6th Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005), the Sixth Circuit affirmed the district court's denial of the defendant's motion to reopen a suppression hearing in order to ask additional questions of a government witness and to call a new witness. Agreeing with the Third Circuit's decision in *Kith-*

cart that "[t]he party moving to reopen should provide a reasonable explanation for failure to present the evidence" at the initial suppression hearing, the Sixth Circuit held that the district court did not abuse its discretion because "Defendant presented no explanation * * * about why he failed to present the evidence initially." *Id.* at 406.

• In *United States* v. *Thompson*, 710 F.2d 1500, 1503 (11th Cir. 1983), the district court suppressed evidence found during a warrantless search, rejecting the government's argument that the search "was permissible as part of an authorized document and safety inspection." The district court denied the government's motion to reconsider based on its new argument that reasonable suspicion existed to conduct the search. The Eleventh Circuit affirmed, holding that "the government waived its right to raise the reasonable suspicion issue * * * by failing to raise the issue at the [initial] suppression hearing without offering any justification therefor." *Id.* at 1504; accord *United States* v. *Villabona-Garnica*, 63 F.3d 1051, 1055 (11th Cir. 1995) ("This Circuit has held that when the government moves to reconsider a suppression motion previously granted, it *must* provide a justification for that motion") (emphasis added).

• In *McRae* v. *United States*, 420 F.2d 1283 (D.C. Cir. 1969), the district court suppressed evidence discovered during a warrantless search. A second district judge granted the government's motion to reopen, heard additional testimony, and ruled that the evidence was admissible. The D.C. Circuit reversed, holding that the district court erred by reopening the suppression hearing without requiring "justification for relitigating the issue." *Id.* at 1288. The court explained that if "the Government wished

to develop new facts * * * , we feel that the prosecutor bore some responsibility to suggest to the Court why these facts had not been elicited at the first hearing." *Id.* at 1289; accord *United States* v. *Greely*, 425 F.2d 592, 593 (D.C. Cir. 1970) ("The government *cannot* relitigate the issues resolved by a suppression order without advancing some justification for its failure to develop those issues fully at the initial hearing") (emphasis added).

Thus, as the court below recognized, the question presented here raises an issue that has deeply divided the courts of appeals. Five circuits have adopted the position advanced by Ozuna, while three—including the Seventh Circuit in this case—have held to the contrary. This deep circuit split has percolated long enough: the Court should grant this petition to resolve the question presented and create uniformity in the lower courts.

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE A RECURRING ISSUE THAT IS OF SUBSTANTIAL IMPORTANCE.

As the numerous courts of appeals' decisions discussed above demonstrate, the issue of whether to reopen suppression hearings recurs with substantial frequency. Indeed, Westlaw is littered with decisions addressing motions to reopen suppression hearings,[2]

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[2] *E.g.*, *United States* v. *Chanley*, 2009 WL 2447983 (D. Nev. Aug. 10, 2009); *United States* v. *Banks*, 2009 WL 585506 (E.D. Tex. Mar. 6, 2009); *United States* v. *Valentine*, 591 F. Supp. 2d 238 (E.D.N.Y. 2008); *United States* v. *Matos*, 2008 WL 5169112 (E.D.N.Y. Dec. 8, 2008); *United States* v. *Martinez*, 2008 WL 4982263 (E.D. Tenn. Nov. 19, 2008); *United States* v. *Goncalves*, 2008 WL 4238707 (N.D.N.Y. Sept. 5, 2008); *United States* v. *Angelov*, 2008 WL 5004311 (S.D. Fla. July 9, 2008); *United States* v. *Pena Ontiveros*, 2008 WL 2446824 (S.D.N.Y. June 16,

with no doubt many more courts—like the district court in this case—resolving such motions in unreported decisions. Because motions to reopen based on evidence available at the time of the initial suppression hearing are commonplace, this Court's resolution of the question presented would have wide applicability beyond the particular facts of this case.

The question presented is also of substantial importance. This Court has recognized a "compelling interest in prompt trials" of criminal defendants. *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984). "As the Sixth Amendment's guarantee of a Speedy Trial indicates, the accused may have a strong interest in speedy resolution of the charges against him." *Id.* at 264. "In addition, 'there is a societal interest in providing a speedy trial,'" for "[a]s time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote." *Id.* "Delay increases the cost of pretrial detention and extends 'the period during which defendants released on bail may commit other crimes.'" *Id.*

The Seventh Circuit's decision will prolong criminal pre-trial proceedings. Absent a strict requirement that a party moving to reopen justify its failure to introduce the evidence forming the basis for the motion at the initial suppression hearing, the lax "totality of the circumstances" approach adopted by the Seventh Circuit increases the likelihood that district courts will hold successive hearings. Many district

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2008); *United States* v. *Dennis*, 2008 WL 2381549 (E.D. Pa. June 10, 2008); *United States* v. *Jarnigan*, 2008 WL 1848902 (E.D. Tenn. Apr. 24, 2008); *United States* v. *Valle-Sierra*, 2008 WL 94805 (D. Colo. Jan. 7, 2008).

judges, wary of reversal, would reopen suppression hearings to admit evidence of dubious relevance that should have been introduced at the initial hearing. Moreover, without a justification requirement, some litigants may seek to game the system by introducing evidence piecemeal, confident that district judges would be unlikely to refuse to hold successive hearings to consider clearly relevant evidence.

The successive suppression hearings likely to follow from the Seventh Circuit's approach necessitates the expenditure of additional judicial resources. The federal caseload has "grown enormously over a generation," which "means unnecessary delay and consequent added cost." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 111 (1998) (Breyer, J., concurring). Since *Steel* was decided, the federal caseload has continued to grow dramatically. Pending federal criminal cases have increased over 71% since 1999 to more than 73,000, with criminal cases per authorized judgeship growing to 105. Administrative Office of the United States Courts, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13, 19 (2009). The Seventh Circuit's approach incentivizes district judges to hold successive suppression hearings, needlessly expending judicial resources and exacerbating the already lengthy backlog of criminal cases in the district courts.

This case illustrates the unnecessary delay caused by the Seventh Circuit's approach. Following the district court's initial decision granting Ozuna's motion to suppress on March 2, 2005, the parties: (a) briefed the government's motion to reconsider the suppression order or reopen the suppression hearing; (b) produced expert handwriting reports; (c) participated in two hearings to take testimony from the ex-

perts; and (d) presented oral argument at a third hearing, culminating in the district court's order denying suppression on June 24, 2005. That lengthy delay and concomitant expenditure of judicial and party resources would not have occurred under the bright-line rule adopted by the majority of circuits because the government did not provide the district court with any justification for its failure to offer handwriting analysis at the initial suppression hearing.

Finally, this case presents an ideal vehicle to resolve the question presented. The Seventh Circuit did not state an alternative holding that would make this Court's review of the question presented irrelevant to the disposition of this case. *Cf. In re Terrorist Bombings*, 552 F.3d at 197 ("Even if we were to impose a 'justification' requirement, the government surely met it here"). Accordingly, if this Court adopted the majority view and required justification to reopen a suppression hearing, then reversal of the Seventh Circuit's decision would necessarily follow.[3]

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[3] After rejecting a bright-line rule requiring justification, the Seventh Circuit discussed several factors in concluding that the district court did not abuse its discretion by reopening the suppression hearing. In finding no basis to conclude that the government intentionally introduced evidence "piecemeal," the court noted that "[i]t does not appear" that the authenticity of the signature on the consent-to-search form "was clearly at issue until the first suppression hearing. App., *infra*, 13a. In fact, Ozuna made clear in moving to suppress that his consent was at issue. C.A. App., Tab 21 at 14–15. But even if the Seventh Circuit's remark were correct, the court did not suggest that it would suffice to provide justification under the bright-line rule.

III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

The Seventh Circuit based its decision on its view that a "flexible approach" that considers "'the totality of the circumstances'" is superior to a "bright-line rule" that bars reopening absent justification for the moving party's failure to introduce the evidence that forms the basis for the motion to reopen at the initial suppression hearing. App., *infra*, 12a. The court reasoned that its approach better "protects society's interest in ensuring a complete proceeding where the court considers all relevant, constitutionally obtained evidence." *Id.* Moreover, the district court "remains free to refuse to reopen the suppression hearing or to decline to consider the government's evidence if the government is wasting judicial resources or proceeding in a way that is unfair to the defendant." *Id.*

1. The Seventh Circuit erred in concluding that its approach better protects society's interest in admitting all relevant evidence. The bright-line rule adopted by the majority of circuits places litigants on notice that they must produce all relevant evidence at the initial suppression hearing. By making clear that a suppression order is final absent justification for introducing additional evidence, the bright-line rule discourages litigants from withholding evidence at the initial hearing and thus increases the likelihood that all relevant evidence will be admitted. In contrast, the totality of the circumstances approach encourages litigants to introduce evidence piecemeal, confident that they will be permitted to introduce additional evidence at a second hearing should the first not go their way. If, however, that confidence proves misplaced and the district court denies reo-

pening—as it may under the malleable totality of the circumstances approach—then "relevant, constitutionally obtained evidence" could be excluded. App., *infra*, 12a.

But even if the Seventh Circuit's approach better protected society's interest in admitting all relevant evidence, that interest "is not unlimited" and may "'bow to accommodate other legitimate interests in the criminal trial process.'" *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998). As we demonstrate *supra* at 17–18, the bright-line rule reduces delay in criminal proceedings and conserves judicial resources. The bright-line rule also promotes "finality in criminal litigation" and discourages "sandbagging" through piecemeal introduction of evidence at successive hearings. *Wainwright* v. *Sykes*, 433 U.S. 72, 88–89 (1977) (requiring habeas petitioner to demonstrate, *inter alia*, "cause" for failure to comply with state contemporaneous objection rule); *cf. Puckett* v. *United States*, 129 S. Ct. 1423, 1431 (2009) (rule requiring contemporaneous objection at sentencing hearing prevents defendant from "'gam[ing]' the system, 'wait[ing] to see if the sentence later str[ikes] him as satisfactory,' and then seeking a second bite at the apple by raising the claim") (internal citation omitted). Discouraging the piecemeal introduction of evidence is particularly critical in criminal proceedings, where the government's greater resources can swamp those of defendants. These considerations far outweigh any interest advanced by the totality of the circumstances approach.

It is no answer to suggest, as did the Seventh Circuit, that district courts can ferret out instances where litigants make strategic decisions to withhold evidence at the initial suppression hearing. App., *in-*

fra, 12a. District judges are not mind readers. Without requiring the moving party to justify its failure to introduce evidence at the initial hearing, district judges generally have no way of knowing whether the moving party made a strategic decision to withhold evidence.

2. The Seventh Circuit's rejection of a justification requirement is also contrary to analogous legal doctrines that require justification. Because the Federal Rules of Criminal Procedure do not directly address motions to reopen suppression hearings, courts have looked to rules governing similar circumstances in setting forth standards for resolving such motions. *See, e.g.*, Fed. R. Crim. P. 12(e) (untimely motions to suppress are waived absent "good cause"); Fed. R. Crim. P. 33(b)(1) (governing motions for new trial based on "newly discovered evidence"); Fed. R. Civ. P. 60(b)(2) (movant seeking to obtain relief from civil judgment based on "newly discovered evidence" must show that it exercised "reasonable diligence" in seeking evidence before judgment was entered). Most commonly, courts have held that "[a] ruling on whether to reopen a suppression hearing is governed by principles of jurisprudence that relate to reopening proceedings, generally." *Carter*, 374 F.3d at 405.

Under this Court's decisions addressing motions to reopen criminal trials in order to introduce additional evidence, the Seventh Circuit's rejection of a justification requirement is incorrect. In *United States* v. *Bayer*, 331 U.S. 532, 537 (1947), for example, four hours after submission of the case to the jury the defendants sought to introduce evidence that "tended to corroborate" one of their witnesses. Assuming that "the proffered evidence was relevant [and] corroborative of the [defendants'] contentions,"

this Court nevertheless held that the district court did not err by refusing to reopen the trial. *Id.* The Court explained in part that the evidence was "well known" to exist before the trial began, that "it should have been apparent that every bolster to [the witness's] credibility would be important," and that the defendants offered "*no excuse* for the untimeliness of the offer." *Id.* at 538–39 (emphasis added).

The Seventh Circuit's rejection of a justification requirement is also at odds with this Court's precedent holding that arguments not timely made at a suppression hearing are waived. In *Steagald* v. *United States*, 451 U.S. 204 (1981), the district court denied the defendant's motion to suppress evidence found during a warrantless search of a residence, holding that an arrest warrant for a third person believed to be living at the residence justified the search. In this Court, the government sought a remand to the district court to resolve its new argument that the defendant lacked a reasonable expectation of privacy in the residence. This Court rejected the government's request, stating that the government "may lose its right to raise factual issues of this sort * * * when it has failed to raise such questions in a timely fashion during the litigation." *Id.* at 209. In doing so, the Court observed that the government provided "no explanation" for its failure to argue that the defendant lacked a reasonable expectation of privacy in the residence during the suppression hearing. *Id.* at 210 n.5; see also *Giordenello* v. *United States*, 357 U.S. 480, 488 (1958) (declining to remand with instructions that district court hold hearing to determine validity of government's new argument for upholding legality of arrest, not made in opposing motion to suppress, because facts upon which gov-

ernment based its new argument "were fully known to it at the time of trial").

Similarly, in this case, Ozuna's motion to suppress made clear his position that he did not consent to the search of his vehicle. Yet the government failed to introduce handwriting analysis of the consent-to-search form at the initial hearing and provided the district court with "no explanation" for its failure to do so. *Steagald*, 451 U.S. at 210 n.5. As in *Steagald*, the government therefore "los[t] its right" to produce handwriting analysis at a successive hearing. *Id.* at 209. The Seventh Circuit erred in holding otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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